Supreme Court, U.S.
FILED

No. __-____ 98 2042 JUN 2 1 1999

IN THE

Supreme Court of the United States

JAMES BENJAMIN, *et al.*,

Petitioners,

—against—

BERNARD KERIK, Commissioner,
New York City Department of Correction, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DANIEL L. GREENBERG
JOHN BOSTON
Counsel of Record
SARAH KERR
DORI A. LEWIS
Attorneys for Petitioners
The Legal Aid Society
Prisoners' Rights Project
90 Church Street
New York, New York 10007
(212) 577-3530

29788

QUESTIONS PRESENTED FOR REVIEW

1. Whether the judgment termination provision of the Prison Litigation Reform Act, 18 U.S.C. § 3626(b), which compels Article III courts to reopen final injunctive judgments in prison litigation under a standard not in effect at the time the judgments were entered, violates the principle of separation of powers by mandating the reopening of final judgments of Article III courts.

2. Whether 18 U.S.C. § 3626(b) deprives litigants of property without due process of law by compelling the reopening of final injunctive judgments in prison litigation under a standard not in effect at the time judgment was entered.

3. Whether 18 U.S.C. § 3626(b) denies litigants the equal protection of the laws by terminating only those injunctive judgments benefiting prisoners under standards applicable to no other group.

LIST OF PARTIES

JAMES BENJAMIN, MIGUEL GALINDEZ, BRUCE HAYES, JOSE SALDANA and ROBERT ESCHERT, detainees of the New York City House of Detention for Men; GUY ZEPTH AMBROSE, LUIS GILCES, FARUK ABDUL GHANI, and JOHNNY JOHNSON, detainees of the Bronx House of Detention for Men; IOLA FORTS and FANNIE BRYANT, detainees of the New York City Correctional Institution for Women; RAYMOND MOCTEZUMA, RONALD FOY, LAWRENCE ODOM, FRANK WILLIAMS, detainees of the Brooklyn House of Detention for Men; ERNESTO MALDONADO, CARL ROBINSON, JAMES CANNADY, detainees of the Adolescent Remand and Detention Center; RALPH VALVANO, DONALD LEROLAND, and JONATHAN WILLIAMS, detainees of the Queens House of Detention for Men; DAVID ROSENTHAL, DOLPH ROSOFF, WILLIE LYNCH, FELIX RIVERA, RAMON MONAGAS, CLIFFORD WILSON, NATHANIEL BELL, SANTOS CEPEDA, GREGORY CHURCHILL, and JOE DAVID EDMONSON, JR., detainees of the Rikers Island Adult Mental Health Unit; individually and on behalf of all other persons similarly situated,

Petitioners,

-against-

BERNARD KERIK, Commissioner of the New York City Department of Correction; GARY M. LANIGAN, First Deputy Commissioner of the New York City Department of Correction; HOWARD ROBERTSON, Warden of the New York City House of Detention for Men; ANDREW TOLSON, JEROME DAVIS, and R. BITZ, Deputy Wardens of the New

York City House of Detention for Men; CLYTON EASTMOND, Acting Warden of the Bronx House of Detention for Men; GLEN SYLVESTER, Warden of the New York City Correctional Institution for Women; LEROY GRANT, Acting Warden of the Brooklyn House of Detention for Men; STEVEN CONRY, Warden of the Adolescent Remand and Detention Center; JORGE OCASIO, Acting Warden of the Queens House of Detention for Men; PETER MAHON and P. PANAGI, Deputy Warden of the Queens House of Detention; RUDOLPH GIULIANI, Mayor of the City of New York; NEAL COHEN, Health Commissioner and Health Services Administrator of the City of New York,

Respondents.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. Background of the Present Proceedings 4

B. Proceedings in the District Court 6

C. Proceedings in the Court of Appeals 7

REASONS FOR GRANTING THE WRIT 9

I. 18 U.S.C. § 3626(b) IS AN UNPRECEDENTED BREACH IN THE PRINCIPLE OF SEPARATION OF POWERS AND PRESENTS A QUESTION FUNDAMENTAL TO THE CONSTITUTIONAL STRUCTURE 9

II. 18 U.S.C. 3626(b) DEPRIVES LITIGANTS OF PROPERTY INTERESTS WITHOUT THE DUE PROCESS OF LAW 20

III. 18 U.S.C. § 3626(b) DENIES PETITIONERS THE EQUAL PROTECTION OF THE LAWS 24

CONCLUSION 27

APPENDIX

En Banc Opinion of the United States Court of Appeals for the Second Circuit 1a

Order of the United States Court of Appeals for the Second Circuit Granting En Banc Rehearing 99a

Panel Opinion of the United States Court of Appeals for the Second Circuit 101a

Opinion of the United States District Court for the Southern District of New York 140a

Partial Final Judgment by Consent 185a

Stipulation for Entry of a Partial Final Judgment by Consent 188a

Opinion of the United States District Court for the Southern District of New York Concerning Jail Fire Safety 247a

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997 (1997) 15

Benjamin v. Jacobson, 923 F.Supp. 517 (S.D.N.Y. 1996) 4

Benjamin v. Koehler, 710 F. Supp. 91 (S.D.N.Y. 1989) 5

Benjamin v. Malcolm, 75 Civ. 3073 (S.D.N.Y., June 8, 1977) 4

Benjamin v. Malcolm, 156 F.R.D. 561 (S.D.N.Y. 1994) 5

Benjamin v. Malcolm, 564 F. Supp. 668 (S.D.N.Y. 1983) 5

Benjamin v. Malcolm, 646 F. Supp. 1550 (S.D.N.Y. 1986) 5

Benjamin v. Malcolm, 659 F. Supp. 1006 (S.D.N.Y. 1987) 5

Benjamin v. Sielaff, 752 F. Supp. 140 (S.D.N.Y. 1990) 5

Board of Education v. Dowell, 498 U.S. 237 (1991) 11, 17, 27

Bridge Company v. United States, 105 U.S. 470 (1881) 13

Brown v. Board of Education, 349 U.S. 294 (1954) . 12

Chrysler Corp. v. United States, 316 U.S. 556 (1942) 14

City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) 26

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 22

Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) 10

Cooper v. Aaron, 358 U.S. 1 (1958) 19

Denike v. Fauver, 3 F.Supp.2d 540 (D.N.J. 1998), *overruled by Imprisoned Citizens Union v. Shapp*, 169 F.3d 178 (3d Cir. 1999) 13

Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392 (2d Cir. 1975).....4

Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct. 2131 (1998) 22

Freeman v. Pitts, 503 U.S. 467 (1992)..... 12, 17

Gordon v. United States, 117 U.S. 697 (1864) 17

Heller v. Doe, 509 U.S. 312 (1993) 25

Hodges v. Snyder, 261 U.S. 600 (1923) 21, 22

Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 2366 (1998) 16

JAK Productions, Inc. v. Wiza, 986 F.2d 1088 (7th Cir. 1993) 20

Johnston v. Cigna Corp., 14 F.3d 486 (10th Cir. 1993), *cert. denied*, 514 U.S. 1082 (1995) 21

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 20

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 22, 23

McCullough v. Virginia, 172 U.S. 102 (1898) 21

Memphis v. United States, 97 U.S. 293 (1877) 21

Missouri v. Jenkins, 515 U.S. 70 (1995) 27

Newsweek, Inc. v. Florida Department of Revenue, 522 U.S. 442 (1998) 23

Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856) 11, 12, 22

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 10, 15, 16, 20, 22

Plyler v. Doe, 457 U.S. 202 (1982) 20, 22

Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974) 4

Romer v. Evans, 517 U.S. 620 (1996) 25

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) 12, 14

Ruiz v. Johnson, 37 F.Supp.2d 855 (S.D.Tex. 1999) 13

System Federation v. Wright, 364 U.S. 642 (1960) . 12, 13, 15

Taylor v. United States, 143 F.3d 1178 (9th Cir.), *rehearing granted, opinion withdrawn*, 158 F.3d 1059 (9th Cir. 1998) 13, 14

Tonya K. v. Board of Education of Chicago, 847 F.2d 1243 (7th Cir. 1988) 21

United States v. O'Grady, 89 U.S. (22 Wall) 641 (1875) 22

United States v. Swift & Co., 286 U.S. 106 (1932) 12, 15

United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968) 12

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const., Art. III 2, 10, 17

U.S. Const., Amend. V 2, 9

18 U.S.C. §3626(b) ..... *passim*

18 U.S.C. § 3626(e)(3) 7

28 U.S.C. §1254(1) 2

28 U.S.C. § 1331 2

42 U.S.C. § 1983 2

Prison Litigation Reform Act of 1995 ("PLRA"), Pub. L. No. 104-134, § 802(b)(1), 110 Stat. 1321, 1321-70 (April 26, 1996) 6

P.L. No. 105-119, 111 Stat. 2470 (November 26, 1997) 3, 7

Rule 60(b), Fed.R.Civ.P.....3, 16

S. 248, 106th Cong., 1st Sess. (1999)..... 18

OTHER AUTHORITY

American Institute of Certified Public Accountants, *Accounting Trends and Techniques* (50th ed. 1996) 20, 22

Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498 (1974) 18

Allen H. Gerstein & Gregory C. Mayer, *The Federal Circuit Balancing Act: Preliminary Injunctions in Patent Cases, in* 1 *Patent Litigation* 603 (Practising Law Institute ed. 1996) 19

Milgram on Trade Secrets § 15.02 (Matthew Bender ed. 1996)..... 19

Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981)..... 18

Marc I. Steinberg, *SEC and Other Permanent Injunctions---Standards for their Imposition, Modification and Dissolution*, 66 Cornell L. Rev. 27 (1980) 19

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

JAMES BENJAMIN, et al.,

Petitioners,

against

BERNARD KERIK, Commissioner,
New York City Department of
Correction, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioners James Benjamin *et al.*, on behalf of themselves and all others similarly situated, respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The *en banc* decision of the United States Court of Appeals for the Second Circuit, Appendix at 1a, is reported at 172 F.3d 144 (2d Cir. 1999). The prior panel opinion of the Second Circuit, Appendix at 101a, is reported at 124 F.3d 162 (2d Cir. 1997). The decision of the District Court from which the appeal was

taken, Appendix at 140a, is reported at 935 F.Supp. 332 (S.D.N.Y. 1996).

JURISDICTION

The Judgment of the United States Court of Appeals sought to be reviewed was entered on March 23, 1999.

The statutory provision believed to confer jurisdiction on this Court to review the said Judgment on a writ of certiorari is 28 U.S.C. § 1254(1).

The district court had jurisdiction over these consolidated cases under 28 U.S.C. § 1331 because Petitioners' claims under 42 U.S.C. § 1983 arose under the Constitution and laws of the United States.

Title 28 U.S.C. § 2403(a) may apply. The courts below did not certify to the Attorney General that the constitutionality of an Act of Congress had been drawn into question, but Petitioners' counsel so notified her, and the United States intervened and filed a brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 1 of the Constitution provides in relevant part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The Fifth Amendment to the Constitution provides in relevant part that:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

Section 802 of the Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626(b) (West Supp. 1999), provides:

> (2) Immediate termination of prospective relief.--In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.
>
> (3) Limitation.--Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation[1] of the Federal right, extends no further than necessary to correct the violation of the Federal rights, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

Rule 60(b), Fed.R.Civ.P., provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final

---

[1] The statute as initially enacted referred to a "current or ongoing violation"; a 1997 amendment changed the language to "current and ongoing." P.L. No. 105-119, 111 Stat. 2470 (November 26, 1997).

judgment, order, or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application.

STATEMENT OF THE CASE

A. Background of the Present Proceedings

During the 1970s, pre-trial detainees in the New York City jails filed separate suits, all certified as class actions, challenging their conditions of confinement. Appendix at 7a (listing cases). After a series of decisions finding constitutional violations,[2] the parties entered into a settlement ("the consent decrees"), *see* Appendix at 185a, 188a,[3] intended to establish on a uniform basis humane and constitutional conditions of confinement. Joint Appendix on Appeal ("J.A.") 196. The decrees addressed many subjects, including the

---

[2] *See, e.g., Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392 (2d Cir. 1975) (affirming finding of unconstitutional overcrowding); *Rhem v. Malcolm*, 507 F.2d 333 (2d Cir. 1974) (affirming finding that totality of conditions were unconstitutional); *Benjamin v. Malcolm*, 75 Civ. 3073 (S.D.N.Y., June 8, 1977) (entering final judgment concerning overcrowding and other issues).

[3] The consent decrees comprise Partial Final Judgments by Consent in each case, each of which adopts and incorporates a Stipulation for Entry of a Partial Final Judgment by Consent which contains the substantive terms of the settlement. Since the consent decrees are nearly identical in terms, petitioners have attached only one of them. The consent decrees have subsequently been modified and supplemented in various respects. *See, e.g., Benjamin v. Jacobson*, 923 F.Supp. 517 (S.D.N.Y. 1996) (granting defendants' request for a modification of legal access services to segregated prisoners).

handling of detainees' mail and property, cell and body searches, maintenance of the physical plant (including vermin and insect control, sanitation, maintenance and refuse removal), food service and related health and sanitary issues. Appendix at 143a. The separate cases were then consolidated for enforcement.

Defendants' failure to comply with the decrees led to a number of post-judgment proceedings, resulting in the establishment of a court monitor (the Office of Compliance Consultants), the entry of a number of more specific orders, JA 571, two findings of contempt,[4] and the imposition of monetary sanctions on those and other occasions.[5] Several times the court found constitutional violations as well as noncompliance with the decrees.[6] Only last November the district court found that fire safety deficiencies at several jails violated the consent decrees' requirement that the jails be maintained in a safe condition, which

---

[4] *Benjamin v. Malcolm*, 156 F.R.D. 561, 568 (S.D.N.Y. 1994); *Benjamin v. Sielaff*, 752 F.Supp. 140, 148 (S.D.N.Y. 1990).

[5] Order re: Noncompliance with Food Service Work Plan (S.D.N.Y., August 17, 1993); Opinion and Order re: Fines for Violation of Compliance Monitoring Work Plan (S.D.N.Y., March 1, 1995); *see* JA 571.

[6] *Benjamin v. Sielaff*, 752 F.Supp. at 141-42 (finding constitutional violation in housing newly admitted detainees for days in receiving rooms and other non-housing areas); *Benjamin v. Koehler*, 710 F.Supp. 91, 93-94 (S.D.N.Y. 1989) (finding that modifications sought in crowding orders would result in unconstitutional conditions); *Benjamin v. Malcolm*, 659 F.Supp. 1006, 1008 (S.D.N.Y. 1987) (same); *Benjamin v. Malcolm*, 646 F.Supp. 1550, 1555 (S.D.N.Y. 1986) (same); *Benjamin v. Malcolm*, 564 F.Supp. 668, 684-85 (S.D.N.Y. 1983).

the court equated with the Fourteenth Amendment's requirement that "fire safety protections must be afforded at a level that does not expose the plaintiffs to an unreasonable risk of serious damage to their future health." Appendix at 255a.

In 1987 the court approved an agreed method for ending this litigation: a "disengagement plan" under which, at defendants' request, OCC is to assess, issue by issue, (1) whether the decree's requirements have been substantially satisfied, (2) there is reason to believe that compliance will be maintained, and (3) the defendants have implemented an internal monitoring mechanism and method for resolving compliance complaints. JA 211, 217. The defendants have never sought to invoke the Disengagement Plan.

B. Proceedings in the District Court

The defendants still had not complied with the Consent Decrees and supplemental orders when the present proceedings began. In early 1996, OCC reported non-compliance in a number of significant areas, including fire safety, maintenance, sanitation, inmate classification, food service, inmate property, and due process. JA 326-88. Later in 1996, OCC reported continuing noncompliance in areas including the plumbing system, JA 569, Exh. 21; general maintenance, JA 569, Exh. 23; sanitation, JA 569, Exh. 24; safeguarding of property, and telephones. Fire safety deficiencies remained largely uncorrected. A panoply of unsafe and unsanitary conditions existed in modular housing units on Rikers Island. JA 230-35, 464-67.

On April 26, 1996 the Prison Litigation Reform Act of 1995 ("PLRA"), Pub.L. No. 104-134, § 802(b)(1), 110 Stat. 1321, 1321-70, was enacted as part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996. The defendants moved on May 24, 1996 to terminate the consent decrees and all supplemental orders based on the PLRA. The

Petitioners challenged the Act's constitutionality and the United States intervened to defend it. The district court (Harold Baer, Jr., D.J.) ruled on July 23, 1996 that the statute was constitutional and that the consent decrees and supplemental orders should be vacated. Appendix at 182a-183a. Petitioners moved to alter or amend the judgment, requesting *inter alia* an opportunity to make a record concerning "current or ongoing" federal law violations, since the time constraints created by the PLRA's automatic stay provision[7] had precluded any meaningful opportunity to do so; Petitioners also sought a stay pending appeal. JA 94-100. The court granted a stay until such time as a stay application could be brought before the court of appeals, and otherwise denied the motion. Appendix at 13a.

C. Proceedings in the Court of Appeals

Petitioners appealed the district court's decision and the Court of Appeals granted a stay pending its own decision. On August 26, 1997 a panel of the Court of Appeals affirmed in part, reversed in part, and remanded. The panel began by noting that the provision for "immediate termination of prospective relief," 18 U.S.C. § 3626(b)(2), is ambiguous and can be read either to bar the future enforcement of consent decrees, except insofar as they are tailored to a federal right, or to render them null and void unless they met the narrow tailoring requirement. Appendix at 107a-

---

[7] This provision, 18 U.S.C. § 3626(e)(3), originally prescribed that prospective relief in prison conditions cases was automatically stayed 30 days after the filing of a motion to terminate. A subsequent amendment provides that the district court may extend the 30-day period by up to an additional 60 days for "good cause." Pub.L. No. 105-119, 111 Stat. 2470, 18 U.S.C. § 3626(e)(3) (West Supp. 1999).

109a. The panel adopted the first interpretation, both on its merits and to avoid the serious constitutional questions that the second, judgment-annulling interpretation would raise. Appendix at 109a-112a, 131a n. 18.

The panel then upheld the statute against all of Petitioners' constitutional challenges, but cautioned that it did so only under its limiting construction, and that the alternative approach, which would annul the judgments themselves, would indeed present "serious constitutional difficulties." Appendix at 131a n. 18. Under the panel's construction the Decrees would no longer be enforceable in federal court, except to the extent that the court made findings that they "remain[] necessary to correct a current or ongoing violation of the Federal right, extend[] no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." Appendix at 136a, *quoting* 18 U.S.C. § 3626(b)(3). However, "[t]he underlying contract, in its time made into a judgment, is left untouched" and may be enforced in state court. Appendix at 134a.

Based on this analysis, the panel held that the district court erred in vacating the decrees and that Petitioners have the option to seek to show entitlement to continuing federal court relief under § 3626(b)(3), or to seek enforcement in state court. It also held that the district court erred in vacating the decrees, since § 3626(b)(3) calls only for the termination of prospective relief. Appendix at 129a-133a.

By order dated December 23, 1997, the Court of Appeals granted rehearing *en banc*, Appendix at 99a, and issued its decision on March 23, 1999. It held that despite the linguistic ambiguity noted by the panel, Congress's intent was unambiguously to terminate consent decrees; that it "seems implausible" that Congress intended them to remain enforceable in

state courts; and that in any case, the consent decrees were conditional on federal court approval, and ceased to be enforceable when that condition failed. Appendix at 22a-27a. However, it went on, the district court erred in directing vacatur of the decrees; the statute prescribes their termination, not annulling them and stripping them of past significance or collateral effect. Appendix at 28a-29a.

The court then upheld the constitutionality of the statute against Petitioners' challenges based on the separation of powers and the Fifth Amendment's Due Process Clause, including a challenge based on the equal protection principle of that Clause. Appendix at 29a-41a. Finally, it held that the Petitioners were entitled to an opportunity, which they had not yet had, to show the existence of "current and ongoing" federal law violations that would justify the retention of part or all of the decrees. Appendix at 41a-44a.

REASONS FOR GRANTING THE WRIT

I. 18 U.S.C. § 3626(b) IS AN UNPRECEDENTED BREACH IN THE PRINCIPLE OF SEPARATION OF POWERS AND PRESENTS A QUESTION FUNDAMENTAL TO THE CONSTITUTIONAL STRUCTURE.

In enacting § 3626(b), Congress has made an unprecedented assertion of power to require federal courts to revise final injunctive judgments of Article III courts according to Congress's orders. If this Act is constitutional, Congress has the power to interfere, essentially at will, with *constitutional* judgments of the federal courts whenever they are embodied in injunctive orders. The implications of this holding go far beyond prison litigation, placing Congress in the position of a court of revision in any injunctive case where

the losing party has the resources to lobby for a different result.

Article III, § 1 of the Constitution provides: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This explicit allocation of power "serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (citations and quotation marks omitted).

Before enactment of 18 U.S.C. § 3626(b), there was no instance in our system of separated powers in which Congress decreed that Article III courts shall terminate final injunctive judgments in constitutional cases. As the Court observed in a similar context, "[t]hat prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

In *Plaut*, the Court removed all doubt that final judgments of an Article III court are immune from revision by the other branches. 514 U.S. at 234. Congress may not subject them, individually or in gross, 514 U.S. at 228, to "a reopening requirement which did not exist when the judgment was pronounced." *Id.*, 514 U.S. at 234. That is because the constitutional design "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy--with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a judicial Power' is one to render dispositive judgments." *Id.*, 514 U.S. at 218-19 (citation omitted).

The point of *Plaut* is that immunity from legislative revision is central to a "dispositive judgment." *Id.*[8]

Section 3626(b) indisputably imposes a new reopening requirement. When the judgments were entered, they could be reopened only via the traditional power of an equity court, codified in Rule 60(b)(5), Fed.R.Civ.P., over its own injunctive judgments. Indeed, this Court has explicitly confirmed that an injunctive consent decree much like this one is "a final judgment that may be reopened only to the extent that equity requires," *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992)--a holding now squarely overturned by § 3626(b).[9]

Under that recognized equitable standard, a decree may be ended when defendants have complied for a reasonable period of time, have exhibited a good-faith commitment to the decree and the underlying law, and are "unlikely to return to [their] former ways." *Board of Educ. v. Dowell*, 498 U.S. 237, 247-50

---

[8] *Plaut* distinguished cases upholding legislation that "altered the prospective effect of injunctions" and said "nothing in our holding today calls them into question." 514 U.S. at 232. But the only such case it cited is *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). As explained below, that case is readily distinguishable from the instant case, and the language in *Plaut* regarding injunctions does not dispose of the question presented here.

[9] In *Rufo*, the Court stated: "A proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor." 502 U.S. at 391. That is exactly what § 3626(b)(3) does in requiring that final injunctive judgments be terminated except to the extent that they "remain[] necessary to correct a current and ongoing violation of the Federal rights" and are narrowly drawn and the least intrusive means to do so.

(1991); *accord Freeman v. Pitts*, 503 U.S. 467, 491 (1992). Likewise under that standard, while the decree is in effect, it may be modified only if there is a "significant change in circumstances" in either fact or law, and the proposed modification is "suitably tailored to the changed circumstance." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. at 383.[10] These standards are very different from § 3626(b)'s termination of judgments based on the lack of findings that were not required at the time they were entered.

The court below, and other courts that have upheld § 3626(b), have done so on grounds that are both invalid and exceptionally dangerous to the constitutional allocation of power among coordinate branches. They have relied on an analogy to *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) ("*Wheeling Bridge II*"), in which a statute declaring a bridge to be a post road and authorizing its continued existence was held to trump a prior injunction against maintaining or reconstructing the bridge.

The analogy is false. In *Wheeling Bridge II*, Congress had done nothing with respect to the court's

---

[10] While these decisions postdate the decrees in this litigation, the Court made it clear that it was breaking no new ground in its holdings. In *Rufo*, the Court stated that it was applying "the traditional flexible standard for modification of consent decrees," rejecting an argument that a 1932 decision had "harden[ed]" that standard. 502 U.S. at 379-80 (distinguishing *United States v. Swift & Co.*, 286 U.S. 106 (1932), from *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968) and *Railway Employees [System Federation] v. Wright*, 364 U.S. 642, 647 (1960).) *Dowell* similarly relied on *United States v. United Shoe Machinery Corp.* and *Brown v. Board of Education*, 349 U.S. 294, 299-301 (1954). *See* 498 U.S. at 247-48.

judgment. Rather, Congress had simply altered the substantive legal rights that the injunction enforced--legal rights that, unlike the constitutional rights asserted in the instant cases, were entirely within Congress's power.[11] The judiciary then declined to continue to enforce these now nonexistent rights. When legislation alters the underlying law "to make legal what the decree was designed to prevent," an equity court obviously should exercise its discretion to alter its own judgments. *Rufo*, 502 U.S. at 388; *see System Federation v. Wright*, 364 U.S. 642 (1960) (holding that consent decree barring union shops should be modified to reflect statutory amendment legalizing union shops). That is a far cry from Congress's action in § 3626(b), which directly mandates the termination of existing prospective injunctions without eliminating or altering the underlying legal rights.

Rather than recognizing this crucial distinction,[12] the court below compounded its error:

> . . . [T]o the extent that a court's final judgment consists of an injunction, Congress may require alteration or termination

---

[11] *Wheeling Bridge II* involved a bridge over a navigable river, a subject over which Congress has "paramount power." *Bridge Company v. United States*, 105 U.S. 470, 475, 480 (1881).

[12] Those courts that have struck down § 3626(b) have emphasized precisely this point in distinguishing *Wheeling Bridge II*. *See Taylor v. United States*, 143 F.3d 1178, 1183 (9th Cir.), *rehearing granted, opinion withdrawn*, 158 F.3d 1059 (9th Cir. 1998); *Ruiz v. Johnson*, 37 F.Supp.2d 855, 876-77 (S.D.Tex. 1999); *Denike v. Fauver*, 3 F.Supp.2d 540, 546-47 (D.N.J. 1998), *overruled by Imprisoned Citizens Union v. Shapp*, 169 F.3d 178 (3d Cir. 1999).

> of its future effect if the law on which the injunction was predicated has been changed. These conditions are satisfied here. By statute Congress has altered the courts' remedial powers so that, in this class of cases, injunctions may not be issued if they are not constitutionally mandated.

Appendix at 33a.

But a law overturning injunctions is not a change in "the law on which the injunction was predicated"; it is a change in the substance of the injunctions themselves.[13] "With respect to the *existing* consent decrees, the only 'change in law' that Congress has brought about is to say, 'terminate the relief.'" *Taylor v. United States*, 143 F.3d at 1183. If legislation that authorizes reopening of judgments is itself deemed a change in law that justifies reopening of judgments, this tautological exception will swallow the rule protecting final judgments. In effect, any act of Congress nullifying any injunctive decree or class of decrees will serve as its own justification. There is no apparent limiting principle to this rationale, which would permit Congress to depart from its role of making the law that courts enforce and to step into the role of deciding cases.

Nothing in this Court's precedents supports the legislative alteration of judgments that is worked by § 3626(b). The cases cited by the appeals court, Appendix at 34a, are either irrelevant to such legislative alteration[14] or, as in *Rufo* and *System Federation v.*

---

[13] The fact that the statute is framed in general terms to affect a category of cases, rather than naming a particular case, does not save it. *Plaut*, 514 U.S. at 228.

[14] *Chrysler Corp. v. United States*, 316 U.S. 556, 562 (1942), affirmed a modification based on changed factual cir-

Wright, *supra*, follow the pattern of *Wheeling Bridge II*, in which the courts adjusted their prospective orders to reflect Congress's changes in the substantive law.

Section 3626(b) is not saved by what some courts have termed its "savings clause," under which plaintiffs may retain previously ordered relief to the extent that they show a "current and ongoing violation" of federal law. That fact places the Petitioners "in no better position than if they simply started a new action." *Taylor*, 143 F.3d at 1184. In substance, it nullifies the judgment, and the availability of further proceedings does not cure this breach of the finality principle. That result is indistinguishable in principle and practice from the actions of colonial legislatures mandating new trials in completed litigation, which was one of the evils that our system of separated powers was designed to cure. *See Plaut*, 514 U.S. at 219.[15]

The court below, and others that have upheld § 3626(b), have cited "the inherent power of the courts

---

(footnote cont'd)

cumstances, not legislative action. *United States v. Swift & Co.*, 286 U.S. at 114-15, also asserted the court's power to modify judgments based on changed facts, and denied modification. *Agostini v. Felton*, 521 U.S. 203, ___, 117 S.Ct. 1997, 2006 (1997), reaffirmed the familiar proposition that injunctions may be modified in light of changes in fact and law, and directed modification based on changes in judicial precedent.

[15] As the Court stated: "It was common for such legislation not to prescribe a resolution of the dispute, but rather simply to set aside the judgment and order a new trial or appeal. . . . [S]uch legislation bears . . . on the problem of finality of judicial judgments." *Id.*

to modify or terminate forward-looking injunctive provisions in light of changes in law or circumstances," Appendix at 35a, in some cases suggesting that for this reason injunctive judgments are never final for purposes of the separation of powers. *See, e.g.*, *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 657 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 2366 (1998). The Court rejected this argument in *Plaut*. There, the petitioners had cited Fed.R.Civ.P. 60(b), which codifies that equitable power. The Court stated: "Rule 60(b), which authorizes discretionary judicial revision of judgments in the listed situations and in other 'extraordinary circumstances,' . . . does not impose any legislative mandate-to-reopen upon the courts, but merely reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity." 514 U.S. at 233-34. While *Plaut* itself dealt with a money judgment, Rule 60(b) also codifies the requirements for revision of injunctive judgments.

Moreover, the notion that an injunctive judgment is not final for separation of powers purposes fundamentally contradicts the logic of *Plaut*, which states that it is "[t]he rules of finality, both statutory and judge-made" that confer "the immunity from legislative abrogation" of final judgments. 514 U.S. at 228, 230. That is, the rules of finality are the same for separation of powers purposes as for any other purpose. Had Congress created different finality rules for injunctive and other judgments, or were such a distinction made in the Federal Rules of Civil Procedure, we would have a different case (as indeed we do in cases of injunctions entered after § 3626(b) was enacted). But the rules of finality contained no such distinction when these judgments were entered, and it cannot be imposed on them after the fact.[16]

It is no answer to say that § 3626(b) addresses only the prospective effects of injunctions.[17] Since the point of an injunction is to have prospective effect, doing away with that effect is to do away with the injunctive judgment. More generally, in an equitable case, to "render dispositive judgment" is to shape a remedy that is calculated to put an end to the violation of law, and to see that the remedy is implemented. *See Freeman v. Pitts*, 503 U.S. at 491; *Board of Educ. v.*

---

[16] Holding injunctions non-final for separation of powers purposes would prove too much. Since finality with respect to the separation of powers is essential to a "dispositive judgment," a case that could not be resolved finally with respect to the separation of powers would be outside the scope of Article III and could not be heard by an Article III court. *See Gordon v. United States*, 117 U.S. 697, 700-704 (1864), *cited in Plaut*, 514 U.S. at 226 (holding that the Supreme Court lacked Article III power to review Court of Claims judgments over which Secretary of the Treasury retained power of approval). Such a result would be absurd both on its face and in light of Article III's language extending the judicial power to "all Cases, in Law and Equity," arising under federal law.

[17] Indeed, the distinction between prospective and retrospective effects cannot be limited to injunctions. A damage judgment that has not been fully executed has a prospective effect, i.e., the defendant must pay in the future. A statute that adjusted the courts' remedial powers by forbidding writs of execution in certain cases or types of cases, leaving the judgment formally intact but robbing it of effect, would surely violate the rule of *Plaut*. There is no principled distinction between that scenario and the prospective termination of an injunction.

Dowell, 498 U.S. at 247-50 (both noting that compliance with orders is a prerequisite to their termination). A statute that terminates injunctive relief without regard to compliance with the court's orders deprives the court of the ability to render a "dispositive judgment."

The question of the limits on Congress's power to require reopening of injunctive judgments is important not just for prison litigation but for all litigation, and indeed for how the nation governs itself. Over the past several decades scores of bills have been introduced to nullify, formally or informally, politically unpopular federal judicial action in areas such as abortion rights, school prayer, and public school desegregation.[18] Until the PLRA, none were passed. Now that the line has been crossed, if the Court upholds § 3626(b), one can expect further efforts to curtail the judiciary's actions on behalf of other unpopular constituencies and causes.[19] It is worth considering whether the nation's public schools could ever have been desegregated had Congress thought, and the courts agreed, that it could pass statutes like § 3626(b) to reopen desegregation decrees, demanding new findings and erecting other new obstacles to the implementation of adjudicated rights.[20]

---

[18] *See* Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 499 (1974).

[19] Presently pending is S. 248, 106th Congress, 1st Sess. (1999), which at § 3 would impose similar termination provisions on all civil actions involving prospective relief binding State or local officials, specifically including relief entered before the date of enactment.

[20] For example, the district court order that became the sub-

Nor can the effects of upholding § 3626(b) be limited to civil rights litigation. Injunctive relief generally and consent decrees in particular are widely used in litigation concerning anti-competitive business practices, environmental protection, securities regulation, labor relations, and private commercial matters. *See, e.g.*, Marc I. Steinberg, *SEC and Other Permanent Injunctions--Standards for their Imposition, Modification and Dissolution*, 66 Cornell L.Rev. 27, 63 (1980) (noting that the SEC resolves about 90 per cent of its cases by consent); 4 *Milgram on Trade Secrets* § 15.02 (Matthew Bender ed. 1996) ("Injunctive relief is the most commonly sought form of relief in trade secret litigation."); Allen H. Gerstein & Gregory C. Mayer, *The Federal Circuit Balancing Act: Preliminary Injunctions in Patent Cases*, *in* 1 *Patent Litigation* 603, 621-23 (Practising Law Institute ed.

(footnote cont'd)

ject of *Cooper v. Aaron*, 358 U.S. 1 (1958), presumably did not recite that it was "narrowly drawn," "extend[ed] no further than necessary to correct the violation of the Federal right," or was "the least intrusive means necessary to correct" that violation. Had Congress enacted a School Desegregation Litigation Reform Act after this Court's decision in *Cooper*, the district court would have had to hold new proceedings, make new findings, and enter a new injunction--notwithstanding this Court's clear prescription to proceed immediately with desegregation. Nor would that necessarily have been the end. Congress could then have added additional requirements, such as findings that the injunctive order was consistent with principles of comity and federalism, or with the retained sovereignty of the States; and it could have continued to add new demands requiring new proceedings, thereby perpetuating uncertainty and undermining the authority of the judiciary in a dangerous situation that required a definitive response.

1996) (noting that injunctions are common in patent litigation). In fact, there are many commercial enterprises whose identifiable intangible assets and good will include prospective restraints on others, e.g., agreements prohibiting a former employee from violating a non-competition clause. *See* American Institute of Certified Public Accountants, *Accounting Trends and Techniques* at 196-200 (50th ed. 1996) (surveying accounting of intangible assets, including non-competition agreements, as assets by large corporations). Such agreements are commonly enforced by injunctions. *See, e.g., JAK Productions, Inc. v. Wiza*, 986 F.2d 1088 (7th Cir. 1993).

To allow the decision below to stand will put all injunctions up for legislative grabs and thereby set the stage for re-creation of the very scenario this Court described in *Plaut*: "The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression." 514 U.S. at 219. If § 3626(b) is deemed constitutional, Congress will become the court of last resort for disappointed litigants who have the wherewithal to pursue legislative reversal in the guise of adjustment of federal court remedies.

II. 18 U.S.C. 3626(b) DEPRIVES LITIGANTS OF PROPERTY INTERESTS WITHOUT THE DUE PROCESS OF LAW.

Section 3626(b), in its retroactive application, destroys expectations freely bargained for and fixed in judicial judgment. ". . . [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Products*,

511 U.S. 244, 265 (1994). This principle finds expression in several constitutional sources, including the Ex Post Facto Clauses, the Takings Clause, the prohibition on bills of attainder, and the Due Process Clauses. *Id.*, 511 U.S. at 266.

Consistently with this principle, judgments have long been viewed as a form of property protected from governmental divestment:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment, the power of the legislature to disturb the rights created thereby ceases.

McCullough v. Virginia, 172 U.S. 102, 123-24 (1898); *accord*, *Hodges v. Snyder*, 261 U.S. 600, 603 (1923); *Memphis v. United States*, 97 U.S. 293, 296 (1877). *McCullough* remains good law. *See, e.g.*, *Johnston v. Cigna Corp.*, 14 F.3d 486, 490-91 (10th Cir. 1993), *cert. denied*, 514 U.S. 1082 (1995).

The court below summarily rejected this vested rights argument, stating: ". . . [T]he provisions of a consent decree that order prospective relief remain subject to modification or alteration for changes in law or circumstances. Such right as a litigant may have to prospective relief is thus neither final nor 'vested' in the constitutional sense." Appendix at 38a.

No decision of this court supports the proposition that a judgment's modifiability negates the vested rights doctrine, and at least one appeals court has explicitly rejected it: "On this view, there are no 'rights' of any kind and every decision fixing interests in property is forever malleable. We doubt the Supreme Court would take that view unless it is willing to overrule *Hodges*, *O'Grady*, and *Wheeling & Belmont Bridge* and jettison the doctrine." *Tonya K. v.*

Board of Education of Chicago, 847 F.2d 1243, 1248 (7th Cir. 1988) (Easterbrook, J.).[21] Certainly the enterprises that list agreements enforceable by injunction among their intangible assets would be surprised to hear that their interests are so evanescent. *See Accounting Trends and Techniques*, *supra*.

Property interests that are defeasible only under defined circumstances are common in the law. *See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985) (holding that a public employee who could be fired for "misfeasance, malfeasance, or nonfeasance in office" nonetheless had a property right in his employment); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"). *Logan*, in particular, shows that the possibility of future loss or modification does not exclude an interest from the purview of due process, since it held that a cause of action--which a litigant has no guarantee of winning at all--is nonetheless "a species of property protected by the Fourteenth Amendment's Due Process Clause." 455 U.S. at 427 (emphasis added). Such contingencies do not rob a judgment of its character as property; they simply mean that the property interest has certain limitations, understood at the time it arises. It cannot be taken by government in a way that is inconsistent with those limitations or otherwise irrational.[22] *Cf. Eastern Enterprises v. Apfel*, 524 U.S.

---

[21] The references are to *Hodges v. Snyder*, *supra*; *United States v. O'Grady*, 89 U.S. (22 Wall) 641 (1875); and *Wheeling Bridge II*, *supra*.

[22] In this connection, *Plaut* observes that "Rule 60(b), and the tradition that it embodies, would be relevant refutation of a claim that reopening a final judgment is *always* a denial of property without due process." 514 U.S. at 233 (emphasis added). We make no argument that such reopening *always*

498, ___, 118 S.Ct. 2131, 2153, 2158-60 (1998) (holding that retroactive imposition of a liability "not calibrated either to Eastern's past actions or to any agreement--implicit or otherwise--by the company" violated the Takings Clause; noting the similarity of takings and due process analysis).

Litigation rules that retrospectively change the consequences of past decisions may deny due process. *Newsweek, Inc. v. Florida Dept. of Revenue*, 522 U.S. 442 (1998) (holding that litigant who relied on availability of tax refund proceeding was denied due process when court ruled it should have sought a pre-payment remedy). More generally, litigation rules that operate irrationally to extinguish legal claims may deny due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. at 434-35 (holding that dismissing claim as untimely, where state agency had failed to act on jurisdictionally necessary administrative remedy within limitations period, denied due process).

Section 3626(b) presents a kind of arbitrariness just as obnoxious as those in *Newsweek* or *Logan*. Petitioners resolved their constitutional claims by consent under the law then applicable. The judgments--Petitioners' property--were understood to be terminable only under the equitable standards reflected in *Rufo* and *Dowell*. Section 3626(b), however, applies completely different standards to the continuation of the judgments, standards whose *retroactive* application denies plaintiffs any meaningful ability to act to protect their rights or to bargain for a different agreement that

---

(footnote cont'd)

denies due process. Rather, reopening must be done consistently with "Rule 60(b), and the tradition that it embodies," rather than by retroactive legislative fiat.

would meet the new standards. Had Petitioners had notice when they settled the case that the § 3626(b) standards would be applied, they could have bargained for a very different agreement--for example, one that provided greater benefits for a shorter period of time,[23] or a private settlement agreement that is not barred or truncated by the PLRA.

There is nothing more irrational or arbitrary than changing the rules of litigation after the fact, when a party cannot take steps to protect his or her interests. When the result of such retroactive action is to extinguish a cause of action or, *a fortiori*, the more concrete property right embodied in a judgment, the government's action denies due process.

III. 18 U.S.C. § 3626(b) DENIES PETITIONERS THE EQUAL PROTECTION OF THE LAWS.

Section 3626(b), along with the rest of the PLRA, is a classic instance of class legislation directed at an unpopular group. This Court recently stated:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government *and each of its parts* remain open on impartial terms to all who seek its assistance. . . . A law declaring that in

---

[23] As the panel put it, "In this respect, we note that at the time the Consent Decrees were entered into, each of the parties gave good and valuable consideration in exchange for what it received. Thus the detainees gave up their right to what could well have been immediate redress of constitutional violations, while the state conceded benefits that were perhaps not constitutionally mandated to gain time to make changes in its prison structure." Appendix at 135a n. 23.

> general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Romer v. Evans, 517 U.S. 620, 633 (1996) (emphasis added, citations omitted).

In *Romer*, the Court applied the rational basis test to strike down a referendum prohibiting legislative, executive or judicial action designed to protect lesbians, gay men and bisexuals from discrimination. It held that the resulting "disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence." 517 U.S. at 633. The Court rejected Colorado's purportedly "legitimate" purpose for the amendment, namely, to protect other citizens' freedom of association, in particular those who have personal or religious objections to homosexuality, and to conserve resources to fight discrimination against other groups. 517 U.S. at 635.

Traditionally, rational basis scrutiny is highly deferential, upholding legislative classifications if there is any conceivable basis for them. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). Citing *Heller*, the court below held:

> Plaintiffs fall far short of meeting their burden. The terms and legislative history of the Act make it clear that, in the unique context of litigation challenging prison conditions, . . . Congress adopted the remedial and termination provisions in order to promote, *inter alia*, principles of federalism and judicial restraint. The objective of limiting the grant or continuation of prospective relief in this context to no more than what is found necessary to remedy the violation of a federal right is unquestionably a legitimate one.

Appendix at 41a.

But this Court has engaged in a more critical analysis of the factual basis for government's purported justifications where the right burdened is particularly important, or a class is in particular need of protection. *Romer* is one example. Similarly, in *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), the Court struck down the requirement of a special use permit for homes for the mentally retarded, after a searching review of the city council's proffered reasons for requiring the permit. *Id.* at 449. The Court engaged in "precisely the sort of probing inquiry associated with heightened scrutiny," asking "whether policy decisions are squarely supported by a firm factual foundation." *Id.* at 458 (Marshall, J., concurring in part and dissenting in part). In *Plyler v. Doe*, 457 U.S. 202, 224 (1982), this Court found Texas' exclusion from school of illegal aliens' children "c[ould] hardly be considered rational" after examining the reasons proffered for it to see if they furthered a substantial state goal.

The use of heightened rational basis scrutiny is appropriate here, as it was in *Romer*, where the legislature is attempting to burden a disfavored--though not suspect--class's ability to employ the remedial mechanisms of society to protect itself and its constitutional rights. Petitioners' argument is indeed more compelling than that in *Romer*, since prisoners in this society are in practice without a voice, and in most cases without a vote. As in *Cleburne*, the court must examine Congress's proffered neutral goals of federalism and judicial restraint and determine whether it is "rational" to apply them *only* to prisoners. 473 U.S. at 449.

Since Congress's professed concerns apply to litigation on behalf of groups other than prisoners, such as litigants challenging school segregation or practices in public housing and institutions for the men-

tally ill and developmentally disabled, *see, e.g.*, *Dowell*, 498 U.S. at 248; *Missouri v. Jenkins*, 515 U.S. 70, 132-33 (1995) (Thomas, J., concurring) (equating courts running school systems with courts running prisons), but § 3626(b) targets only prisoners, this Court should grant review and hold that § 3626(b) is not rationally related to a legitimate government interest.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Dated: New York, New York
June 17, 1999

Respectfully submitted,

DANIEL L. GREENBERG
JOHN BOSTON (Counsel of Record)
SARAH KERR
DORI A. LEWIS
Attorneys for Appellants
The Legal Aid Society
Prisoners' Rights Project
90 Church Street
New York, New York 10007
(212) 577-3530